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Westchester County Roundup: July 2019

Judge Román Holds Environmentalist in Contempt of Court for Refusal to Comply with the Court's Orders

In *Waterkeeper Alliance, Inc. v. Spirit of Utah Wilderness, Inc.*, No. 10-CV-1136, 2019 WL 1517579 (S.D.N.Y. Apr. 5, 2019), Judge Nelson Román sanctioned environmentalist Jeffrey Salt for failing to comply with the Court's order that Salt renounce his use of the Plaintiff's Waterkeeper trademarks. Plaintiff Waterkeeper Alliance, Inc. is an environmental organization dedicated to the preservation of the United States' waterways. Defendant Spirit of Utah Wilderness ("SUW") and its principal Jeffrey Salt became members of Waterkeeper's organization and received a license from Waterkeeper to use the name "Great Salt Lakekeeper." Salt subsequently was convicted of assault, after which Waterkeeper revoked SUW's license and membership. Salt, however, continued to use the Waterkeeper trademarks by publicly referring to himself as the Executive Director of Great Salt Lakekeeper and using a Lakekeeper email address. Waterkeeper commenced an action alleging trademark infringement, unfair competition, and related New York State law claims to stop Salt from using Waterkeeper's marks. During the near decade long proceedings, Defendant's counsel resigned and, after six months of failing to retain new counsel, SUW defaulted. On May 8, 2015, Judge Román found that Salt had infringed upon Waterkeeper's marks and enjoined SUW, its officers, and Salt from using any of Waterkeeper's marks or referring to himself with any title at Lakekeeper. After failing to comply with Judge Román's order, Plaintiff filed a motion to hold Salt in contempt. Judge Román granted Plaintiff's motion and in the accompanying Contempt Order, dated October 2, 2017, directed Salt to comply with the Court's Order and pay daily fines for violations of the Court's orders. After Salt still refused to comply, Waterkeeper moved for sanctions and to hold Salt and SUW in further contempt. Judge Román held an evidentiary hearing and found that Salt should be held in civil contempt because (1) the order not complied with was clear and unambiguous, (2) the proof of noncompliance was clear and convincing, and (3) Salt had not diligently attempted to comply in a reasonable matter. Judge Román therefore ordered Salt and SUW to post a statement on any and all online platforms, including their website and LinkedIn, declaring the termination of their affiliation with Waterkeeper and to continue posting the statement for two years. If Salt and SUW refuse to comply with this second Contempt Order, Judge Román granted Waterkeeper leave to move for Salt's imprisonment.

Judge Seibel Grants Motion for Class Certification of Mobility-Impaired Visitors to SUNY Purchase

In *Westchester Independent Living Center, Inc. v. State University of New York, Purchase College*, No. 16-CV-5949, 2019 WL 2474254 (S.D.N.Y. June 12, 2019), Judge Cathy Seibel granted Plaintiffs' Motion for Class Certification under Fed. R. Civ. P. 23(b)(2). The individually named plaintiffs all suffer from mobility disabilities. Westchester Independent Living Center ("WILC") is a "peer-driven, community-based organization that helps people with disabilities to lead self-directed lives in the community through advocacy, training, and referrals to resources that promote independent living." Defendant SUNY Purchase is a 500-acre college campus in Westchester County that hosts more than 4,200 students and 450 faculty members and welcomes thousands

of guests every year to its Performing Arts Center and library. In their Complaint, Plaintiffs alleged that as a result of SUNY Purchase's systemic failure to provide accessible rights-of-way and other accommodations, students and visitors with mobility disabilities encounter pervasive barriers to meaningful access to the school's programs, services and activities in violation of federal and state disability discrimination laws. Plaintiffs sought injunctive relief only, not monetary damages, and then moved for class certification. Applying the four-part test set forth in Fed. R. Civ. P. 23(a), Judge Seibel concluded that class certification was appropriate because: (1) the class was so numerous that joinder was impracticable; (2) there were questions of law or fact common to the class; (3) the claims and defenses of the representative parties were typical of the class; and (4) the representative parties would protect the class interests. As to numerosity, the Court concluded that the proposed class contained at least forty members (the Second Circuit threshold) because it included current, former, and future students and census data suggested well over forty students and visitors per year will have mobility disabilities. Judge Seibel relatedly found that joinder of individual claims was impracticable because the proposed class included future students and visitors whose identities are unknown. Regarding commonality, Judge Seibel found this prong satisfied because a common issue unites all class members-whether SUNY Purchase's policies deprive them of meaningful access to school services. The Court found typicality satisfied because none of the defenses proffered by SUNY Purchase were unique to individual class members. Finally, Judge Seibel ruled that the named plaintiffs themselves and class counsel can adequately represent the class. The Court concluded by rejecting all of Defendants' remaining arguments against class certification and so granted Plaintiffs' Motion.

Judge Briccetti Grants Defendants' Motion to Dismiss Amended Complaint Alleging RICO Violations

In *Dynarex Corporation v. Farrah*, No. 18-CV-7072, 2019 WL 2269838 (S.D.N.Y. May 28, 2019), Judge Vincent Briccetti granted multiple Defendants' motions to dismiss Plaintiff's amended RICO complaint alleging mail and wire fraud, in violation of 18 U.S.C. § 1962(c) and (d). Plaintiff Dynarex Corporation is a manufacturer and distributor of medical and janitorial supplies. Plaintiff alleged that defendant Richard Farrah, Dynarex's Vice President of Sales, masterminded three schemes to defraud Dynarex. The first scheme arranged for the sale of Dynarex products to Defendants Provimed, Inc. and Isaac Wosner at below standard prices, with defendants splitting the alleged $713,352 in savings. In the second scheme, Farrah allegedly conspired with Defendants Sidra Medical Supply, Inc. and Muhammad Momen (the "Sidra Defendants") to steal nearly $70,000 of products from Dynarex's Rockland County warehouse in return for kickbacks. For the third scheme, Farrah allegedly conspired with other named Defendants "on at least 27 occasions to manipulate invoices and reduce them from standard pricing," splitting the $291,993 in savings. Farrah was arrested in January 2018 and charged with second-degree larceny. The Sidra Defendants, along with defendants Dolores Mazza and Isaac and Rebecca Wosner all moved to dismiss for failure to state a claim. Judge Briccetti granted the motions, finding Plaintiff failed to sufficiently allege the existence of a RICO enterprise. The Court found Plaintiff alleged a "classic rimless hub-and-spoke conspiracy." The three schemes alleged in the Amended Complaint were separate and any allegation that they were related was conclusory. As such, Plaintiff failed to properly allege that the Defendants constituted an "enterprise," and Judge Briccetti dismissed the RICO claims. The Court then declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed the action in its entirety.

Judge Karas Grants Defendants' Motion to Reconsider; Vacates in Part Court's Prior Opinion on Prisoner's Alleged Due Process Violations

In *Allah v. DePaolo*, No. 17-CV-6313, 2019 WL 1649021 (S.D.N.Y. Apr. 4, 2019), Judge Kenneth Karas granted Defendants' Motion for Reconsideration of the Court's decision, which had sustained Plaintiff's procedural due process claim against certain

individual Defendants and held that Plaintiff's procedural due process claim failed in its entirety. Plaintiff Kha'Sun Creator Allah, a federal prisoner, brought the action pursuant to 42 U.S.C. § 1983 against various Department of Corrections officials, alleging that his First and Fourteenth Amendments were violated when he was sentenced to 90 days in the Special Housing Unit ("SHU") following a disciplinary hearing. Plaintiff contended that the hearing was based on false statements and testimony and the hearing officer was biased and unfair. In an amended opinion, dated March 26, 2019, Judge Karas upheld Plaintiff's procedural due process claims against three individual Defendants. Upon Defendants' motion for reconsideration, the Court recognized that its March 26 opinion "erroneously conflated an analysis of Plaintiff's First Amendment retaliation claim, with an analysis of Plaintiff's Due Process Clause Claims." Citing Second Circuit precedent, Judge Karas explained that SHU confinements of less than 101 days do not generally raise a liberty interest warranting due process protection. As such, even if Plaintiff sufficiently alleged that the disciplinary hearing which led to his 90-day solitary confinement contained procedural defects, because Plaintiff had not alleged facts suggesting that he was deprived of a liberty interest, his procedural due process claim failed as a matter of law.

Westchester Supreme Court Justice Colangelo Denies Local School District's Motion to Dismiss Intentional Tort Claims

In *Santora v. Bedford Central School District*, No. 64036/2018, 2019 WL 2108087 (N.Y. Sup. Ct. West. Cty. May 6, 2019), Justice John Colangelo denied Defendants' motion to dismiss Plaintiff's defamation and intentional infliction of emotional distress claims. Plaintiff Andrew Santora was a former Special Education Instructional Assistant at Fox Lane High School in Defendant Bedford Central School District ("BCSD"). Plaintiff was hired by BCSD in September 2012 and received repeated and consistent promotions and satisfactory evaluations. On November 28, 2017, Plaintiff was aiding a student using the "specialized behavior plan," which called for reinforcement of good behavior by rewarding the child with positive responses to verbal requests. After demonstrating good behavior, this student requested that Santora draw a cat on the student's arm. Santora granted the student's request, which was similar to other routinely approved student requests, in the presence and with the approval of several teachers. The following day, Santora was removed from the classroom by the school's Principal and Assistant Principal over the "incident" that occurred the day before. Plaintiff was placed on administrative leave and Defendant Escobar, Director of the Pupil Personnel Services Department of BCSD, distributed an email to all front staff of the District stating Plaintiff was not allowed on any BCSD property and that if seen, the police should be called. Two months later, after Plaintiff and BCSD entered into a Separation Agreement in which Santora agreed to not return to BCSD property, Defendant Escobar distributed another email containing a large photograph of Santora, and requested that BCSD staff post his picture where "appropriate," to remind people that he was not allowed on BCSD property. Following the distribution of Santora's photographs, disparaging comments about Santora were made by BCSD officials alluding to the assertions that Santora's actions were "inappropriate." Plaintiff brought suit claiming he had been defamed and irreparably harmed by these statements and suffered severe emotional distress. In their motion to dismiss, Defendants argued that their statements were not defamatory, but rather were necessary for the BCSD staff members to enforce the substance of the Separation Agreement. Additionally, because the statements were not defamatory, they could not be challenged absent a pleading of special damages. Justice Colangelo disagreed, finding that not only was the circulation and posting of Santora's picture and the statements made regarding his conduct unnecessary, they were also defamatory per se. Plaintiff was therefore not required to plead special damages. Accordingly, the Court denied Defendants' motion to dismiss in its entirety.